JAN 6 19

Supreme Court of the United States

October Term, 1964

No. 390

CLAIR LAVERNE WHITE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

INDEX

Cases Cited

	PAGE
Affeldt v. United States No. 13,941, Dec. 14, 1954	2
Ashauer v. United States 9th Cir., No 14,304, Dec. 21, 1954	2
Clark v. United States 9th Cir., No. 14,176, Dec. 3, 1954	3
Close v. United States 7th Cir., 1954, 215 F. 2d 439 (No. 447, October Term, 1954)	3
Dickinson v. United States 346 U. S. 389 (1953)	3
Franks v. United States 9th Cir., 1954, 216 F. 2d 266	3
Hinkle v. United States 9th Cir., 1954, 216 F. 2d 8, 10 (No. 448, October Term, 1954)	2
Jessen v. United States 10th Cir., 1954, 212 F. 2d 897	3
Pitts v. United States 9th Cir., No. 14,164, Dec. 7, 1954	2
Schuman v. United States 9th Cir., 1953, 208 F. 2d 801	3
Simmons v. United States No. 251, October Term, 1954	4
Simon v. United States 9th Cir., No. 14,942, Dec. 17, 1954	3
Williams v. United States 5th Cir., 1954, 216 F. 2d 350, 351-352	4

Miscellaneous Citations

PAGE

University of Pennsylvania Law Review, Vol. 102, pp. 694, 697 (March, 1954) 4

Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

MAY IT PLEASE THE COURT:

Since the filing of the petition and the petitioner's reply to the memorandum of the United States the court below has handed down a number of decisions that are pertinent here.

Such decisions relate to the effect of a personal appearance before the local board, which has power to judge credi-

bility (which is known to the appeal board) as basis in fact for the denial of the conscientious objector status by the appeal board. It should be remembered that the registrant does not appear before the appeal board.

The court below in this case held, because of White's attitude when before the local board of refusal to do any governmental service, that the appeal board did consider this as evidence of his insincerity.

In *Hinkle* v. *United States*, Sept. 24, 1954, 216 F. 2d 8, 10 (pending on certiorari in this Court, No. 448, October Term, 1954), the court below found no basis in fact for the denial of the conscientious objector status. The court said that the denial "was not based upon any personal appearance of Hinkle."

The court below also (but later) in *Pitts* v. *United States*, No. 14,164, Dec. 7, 1954, qualified its holding in this *White* case. There the court held that because nothing in the memorandum of personal appearance made by the board showed that the credibility of Pitts was questioned by the local board, the case had to be determined by the papers in the file alone. The court below said: "We have therefore before us a situation which requires the application of the principle applied in the *Dickinson* case." The court found no basis in fact for denial of the conscientious objector status.

The same holding was made by the court below in *Affeldt* v. *United States*, No. 13,941, Dec. 14, 1954. There the court found no basis in fact for the denial of the conscientious objector status. The court said: "At any rate, nothing about the papers filed by Affeldt or in his personal appearance before the local board, would appear to warrant any finding of insincerity, sham or fakery in his claim that he was conscientiously opposed to participation in war in any form."

More recently, in *Ashauer* v. *United States*, No. 14,304, decided December 21, 1954, the court below held that it was necessary for the local board to show in its memorandum

something to indicate a finding of insincerity. The court said: "If anything which occurred at that interview, including Ashauer's demeanor or the manner in which he conducted himself, was inconsistent with or derogative of his avowal of conscientious objection, there is no hint of it in the board's memorandum regarding the interview." The court below then relied upon *Dickinson* v. *United States*, 346 U. S. 389 (1953); *Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897; and *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439 (No. 447, October Term, 1954, in this Court). The *Schuman* case, *supra*, was criticized in footnote 4 of the opinion in the *White* case.—See page 26 of the petition for writ of certiorari; compare *Simon* v. *United States*, 9th Cir., No. 13,942, Dec. 17, 1954.

Applying the law of the Ninth Circuit, as clarified in these more recent opinions, it is plain from a reading of the record, the opinion of the court below and the petition in this case that there was no basis for the speculative finding by the court below that the local board disbelieved the petitioner. The memorandum states: "Board feels employment status such as to indicate remaining in I-Ao [sic] classification." (See footnote 3 of opinion below, page 24 of the petition.) The local board memorandum merely shows a belief that the performance of war work as a civilian disqualified the petitioner from claiming the conscientious objector status. It is not a finding that he was insincere. In *Clark* v. *United States*, No. 14,176, Dec. 3, 1954, and *Franks* v. *United States*, Oct. 4, 1954, 216 F. 2d 266, the court below held that performing war work as a civilian was no basis for denial of conscientious objector status when a registrant was classified I-A but that it was when a registrant was classified I-A-O by the board, as here in this *White* case.

The performance of civilian war work is no basis for finding a conscientious objector insincere. It necessarily follows that the court below was unjustified in speculating that the appeal board considered the memorandum of personal appearance, showing the local board's attitude toward White's work, as basis in fact for denial of the conscientious objector status in this case.

In any event the holding of the court below in this case is in direct conflict with *Williams* v. *United States*, 5th Cir., Oct. 29, 1954, 216 F. 2d 350, 351-352, where it was held that failure of the local board to indicate its disbelief of the registrant prevented the court from speculating a finding of insincerity.

A note in 102 University of Pennsylvania Law Review 694, 697 (March, 1954), condemns an "unexplained disbelief of the testimony" presented to the board and says that the doctrine of no basis in fact would "become an empty protection if satisfied by demeanor evidence."—See pages 33-34 of the Brief for Petitioner in *Simmons* v. *United States*, No. 251, October Term, 1954.

CONCLUSION

The law of the Ninth Circuit that demeanor evidence based on a religious belief of total neutrality and objection to all work under direction of the Government can be used as basis in fact for denial of the conscientious objector status will not be changed by a decision of the present conscientious objector cases before this Court. The holding that willingness to do civilian war work is basis in fact for a denial of the conscientious objector status when the registrant is classified in Class I-A-O (non-combatant soldier) but not when classified I-A (combatant soldier) will not be disposed of in the pending conscientious objector cases.

For these reasons it is suggested that the petition not be held up pending determination of those cases but be granted and the case be set down for argument and submission so that these questions, undetermined in the pending cases, will be settled.

Respectfully submitted,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

January, 1955.